looked into as an aid to the construction of the first one but I do not think that the clause in the services agreement relating to future developments of technical and manufacturing processes of sugar and allied products can be read into the know-how agreement so as to alter the character of the payments which the appellant received from the Corporation under this know-how agreement.

The services agreement and the consideration received by the appellant thereunder were the subject-matter of the cross-appeal by the Revenue and on this I agreed with the Special Commissioners that the sum of $600,000 paid to the appellant under the services agreement was business income under the India Order and not royalty under the said Order.

In the event I allowed the appeal of the appellant and dismissed the cross-appeal by the Revenue with costs.

*Appeal allowed.*
*Cross-appeal dismissed.*

Solicitors: *Skrine & Co.*

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## OOI BOON PAK & ORS. v. TEOH KEE KEONG

**[O.C.J. (Arulanandom J.) May 25 & June 15, 1981]**
**[Penang — Originating Motion No. 42 of 1981]**

*Land Law — Caveat — Application to remove — Access to caveator's mining land — Effect of removal of caveat — Court's refusal to expose caveator to complete closure of access to mining land.*

The plaintiffs applied to remove a caveat lodged by the defendant. The plaintiffs sought to register a Memorandum of Transfer of the property concerned free from encumbrances in the name of a third party to whom the plaintiffs had sold the property.

On December 11, 1975, the plaintiffs had entered into agreement with the defendant wherein the defendant in consideration of the plaintiffs allowing the defendant to construct a vehicle road for the defendant's use to have access to the sand mine operations of the defendant agreed to pay $350 a month. It was on the strength of the said agreement that the said caveat was lodged. On January 1, 1978, the said agreement was varied by the monthly payment being reduced to $300 a month. The plaintiffs alleged that the said agreement was rescinded in October 1980. The plaintiffs further claimed that the defendant was in breach of the agreement because he did not pay the $300 on the first week of the month without fail although there was nothing in the agreement to indicate that time was the essence of the contract. The defendant, on the other hand, contended that he used to pay the rentals in arrears but since February 1980 the plaintiffs had refused to accept the rent.

**Held,** dismissing the plaintiffs' application: (1) on considering the conduct of the plaintiffs, it was quite clear that the plaintiffs acted *mula fide* and intended to obstruct the defendant's access, and thus prevent him from operating his sand mine;

(2) if the caveat were removed and the new purchasers do not recognize the defendant's right of access, it would cause undue hardship and irreparable damage to the defendant;

(3) when the caveator's interest requires protection then the courts would refuse applications for removal summarily; no court of equity could order summary removal of the caveat and expose the caveator to a complete closure of access to his land where he is operating a sand mine; the proper course would be for a writ to be issued and the issues brought up for trial where the court could make such order as the court thinks just;

(4) hence, in this case if the matter were properly adjudicated, the court, if it considers it just and reasonable, could order the amendment of the caveat to protect the interests of the defendant so far as the access to his mine was concerned and permit the registration of the transfer subject to the defendant's rights. Before doing this, the parties should be heard in a proper trial so that all facts could be fully established.

*Case referred to:-*

(1) *N. Vangedaselam* v. *Mahadevan & Anor.* [1976] 2 M.L.J. 161.

ORIGINATING MOTION.

*N.G. Sivanandan* for the plaintiffs/applicants.

*Mahinder Singh Dulku* for the defendant/respondent.

*Cur. Adv. Vult.*

**Arulanandom J.:** This was an application by the plaintiffs for the following reliefs: —

"(1) That the Registrar of Titles be directed to remove the Private Caveat No. 2685/80 Jilid No. 50 Folio No. 36 dated the 1st day of December 1980 entered against the aforesaid lands.

(2) That the defendant do pay the plaintiffs compensation for any damage or loss occasioned by the defendant's wrongful entry of the Private Caveat.

(3) That the costs of and incidental to this application be taxed as between party and party on the Higher Scale and paid by the defendant to the plaintiffs."

The purpose of the application is for the plaintiffs to register a Memorandum of Transfer of all that piece of land known as Lot No. 353 Mukim 13, Sungei Relau, Daerah Timor Laut (hereinafter referred to as the said property) free from all encumbrances in the name of Chong & Company Sdn. Bhd. to whom the plaintiffs had sold the said property and received the consideration.

The plaintiffs in their affidavit affirmed on March 27, 1981 admit that on December 11, 1975 one of them entered into an agreement with the defendant wherein the defendant in consideration of the plaintiffs allowing the defendant to construct a vehicle road for the defendant's use to have access to the sand mine operations of the defendant on Lot 2115 agreed to pay the sum of $350 a month. It was on the strength of this agreement that the said caveat was lodged. On January 1, 1978 this agreement was varied by the monthly payment being reduced to $300 a month. But the plaintiffs now allege that this agreement was rescinded in October 1980 but apart from their mere allegation there is no evidence that the agreement was in fact rescinded. The plaintiffs claim that the defendant was in breach of the agreement because he did not pay the $300 on the first week of the month without fail although there is nothing in the agreement to say that time was of the essence of the contract.

Furthermore there is evidence that the defendant through his solicitors forwarded a cheque for $3,000 to cover arrears of rent to the plaintiffs by A.R. Registered post but this letter was returned unopened to the defendant's solicitors with the endorsement "Refused". The defendant further alleges that he used to pay the rentals in arrears but since February 1980 the plaintiffs had refused to accept the rent. This is categorically stated in the letter of the defendant's

solicitors dated November 5, 1980 and has nowhere been denied by the plaintiffs.

The defendant operates a sand mine in the area. The area had been subdivided and a separate title given for the path demarcated to be the right of way leading to lands away from the main road but through bureaucratic malaise the title to that path was allowed to remain in the name of the original owner. It was only after litigation that the defendant had the right of way established. Similarly the defendant's access road to his sand mine did pass through a portion of the plaintiffs' land, hence the need for the lease. But quite unilaterally the plaintiffs decided to avoid the lease by entering into a contract of sale to a third party although by the defendant establishing the public right of way even the plaintiffs benefited.

According to the defendant's averment in his affidavit in paragraph 6, the defendant states as follows: —

"6. The first plaintiff did inform me that he was going to sell his land to someone. But he also assured me that he would inform the new owners of my rights. It is quite apparent the new owners are not recognising my established rights and have, either singly or in concert with the plaintiffs, tried all sorts of methods to interrupt my lawful business operations. I would like to point out to this Honourable Court that in the last paragraph of my solicitors letter dated November 5, 1980 (exhibit 'E' in the Joint Affidavit) I pointed out to the first plaintiff that the access to my mine was being blocked. I annex herewith several photographs of the road which will show the aforesaid obstructions and marked as exhibit 'C in a bundle'. The plaintiff failed to reply to my notice. My solicitor again wrote to the first plaintiff on January 2, 1981 informing him that he failed to respond to my solicitor's earlier notice. I annex herewith photocopies of the aforesaid notice and the Certificate of Posting and marked as exhibit 'D'. The plaintiff failed to reply to any of my allegations and instead my solicitor received a letter dated January 2, 1981 from the first plaintiff's solicitor directing my solicitor to direct all future correspondence to them. I annex herewith a photocopy of the aforesaid letter and marked as exhibit 'E'. My solicitor accordingly wrote to the first plaintiff's solicitors on January 8, 1981 requesting for replies to my various notices. The first plaintiff's solicitors failed to reply and my solicitor therefore sent a reminder on February 10, 1981. A reply dated February 11, 1981 was received by my solicitor on February 13, 1981. My solicitor wrote on February 13, 1981 and the First plaintiff's solicitors replied on February 27, 1981. I annex herewith photocopies of the aforesaid letters and marked as exhibits 'F in a bundle'. From a perusal of the aforesaid letters this Honourable Court will notice that the plaintiffs have failed to reply to any of my allegations contained in the aforesaid letters. Their silence indicates guilt."

On considering the conduct of the plaintiffs, both in the manner they dealt with the defendant's access road and his letters of complaint, it is quite clear that the plaintiffs were acting *"mala fide"* and were intent on obstructing the defendant's access and thus preventing him from operating his said mine.

If the caveat is removed and the new purchasers do not recognise the defendant's right of access it would cause undue hardship and irreparable damage to the defendant. It would necessarily lead to further litigation so that the courts could adjudicate on the issue.

Our courts have held that when the caveator's interest requires protection then the courts would refuse applications for removal summarily.

In my opinion, no court of equity could order summary removal of the caveat and expose the caveator to a complete closure of access to his land where he is operating a sand mine. The proper course would be for a writ to be issued and the issues brought up for trial where the courts could make such order as the court thinks just. In the case of *N. Vangedaselam* v. *Mahadevan & Anor.*[1] the Lord President said as follows: —

"I am of the opinion that under that Code (National Land Code) also, you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim."

And the Lord President went on to say on page 163: —

"Thus in the instant case the caveator might have said in Form 19B that he applied for the entry of a caveat upon the title to Merah Estate, to be expressed to bind the particular interest described in the Schedule (the description to read something like this 'title to, or registrable interest in or a right to title or interest, in that portion approximately 18,000 sq. ft. in area comprising the tindal's house now occupied by the caveator) on the ground that the deceased Mr. Ratnavale had by written agreement dated December 22, 1966, undertaken in consideration for service rendered to give that portion free to the caveator; and the caveator could have caused to be inserted in Form 19A a description of the effect of the caveat reading something on the following lines, 'the effect thereof is that the land shall not be transferred, charged or leased by the proprietor unless the transfer, charge or lease is expressed to be subject to the claim of the caveator to the particular interest described'."

As the learned author of the article Private Caveats: Entry, Extension and Removal says on page xi of [1979] 2 M.L.J.: —

"Under section 327(1), the court's jurisdiction and discretion are very wide. It can make a number of orders consistent with what is just or reasonable according to the circumstances of each case. It may by order under section 417(1) direct the Registrar to amend the caveat to give effect to the protection of the interest claimed or to remove it altogether, or to substitute it with an endorsement of the tenancy as appears just to the court. Since judicial discretion is involved, there is no reason why the court's hands should be tied."

Hence in this case if the matter were properly adjudicated, the court, if it considers it just and reasonable, could order the amendment of the caveat to protect the interests of the defendant as far as the access to his mine was concerned and permit the registration of the transfer subject to the defendant's rights. Before doing this, parties should be heard in a proper trial so that all facts can be fully established.

For the reasons stated above the court dismissed the originating motion with costs.

*Application dismissed.*

Solicitors: *Presgrave & Matthews; Mahinder Singh & Dulku.*